

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
NO: 5:05-CR-00055-BR

UNITED STATES OF AMERICA

v.

PATRICK O'NEIL GILL

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ORDER

This matter is before the court on defendant's motion pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure. (DE # 40.) Based on his belief that the court improperly departed upwardly pursuant to U.S.S.G. §§ 2A2.1 and 5K2.21, defendant requests that the court re-sentence him and lower the term of imprisonment. (*Id.* at 4.) This motion challenges the validity of his sentence. As such, the challenge must be brought as a motion pursuant to 28 U.S.C. § 2255, rather than pursuant to Rule 60(b). *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005); *United States v. Winestock*, 340 F.3d 200, 207 (4<sup>th</sup> Cir. 2003) (explaining how courts should determine whether a Rule 60(b) motion is proper versus "a 'successive [application] in 60(b)'s clothing'" and recognizing that "a motion directly attacking the prisoner's conviction or sentence will usually amount to a successive application" (citation omitted) (alteration in original)). Defendant has previously filed a § 2255 motion (which the court dismissed on 15 October 2008), and in that motion, he also claimed that the court improperly departed upwardly. The court lacks jurisdiction to rule on a second or successive § 2255 motion without authorization from the Court of Appeals for the Fourth Circuit. *See* 28 U.S.C. § 2255(h). The

motion is DISMISSED WITHOUT PREJUDICE.

This 9 January 2013.

A handwritten signature in green ink, appearing to read "W. Earl Britt", is positioned above a horizontal line.

W. Earl Britt  
Senior U.S. District Judge